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No. 55068-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

PLANET EARTH FOUNDATION, JOHN KEITH BLUME, JR and LISA BLUME,

Plaintiffs/Appellants.

v.

GULF UNDERWRITERS INSURANCE COMPANY and AMERICAN BUSINESS & PERSONAL INSURANCE, INC.

Defendants/Respondents.

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

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ORIGINAL

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I.
INTRODUCTION

Planet Earth's request for discretionary review does not meet any of the requirements under RAP 13.4(b). The rule is very explicit: discretionary review will only be accepted if the request meets at least one of the four conditions. Contrary to the cursory assertion made by Planet Earth, the court of appeals' decision does not conflict with any of this Court's decisions or any decision by another court of appeals. Nor does the decision involve an issue of substantial public interest that should be determined by this Court. Neither the trial court, nor the court of appeals, created new law or expanded a legal theory. Instead, both courts applied principles that have a long history in this state.

Gulf requests this Court to deny Planet Earth's request for discretionary review.

II.
STATEMENT OF THE CASE

The court of appeals, as did the trial court, held that all of the allegations contained in the NYU complaint arose from Planet Earth's providing professional services to NYU. As such, all allegations fell within the professional services exclusion of the policy which provided:

> In consideration of the payment of premium, it is hereby understood and agreed that the Insurer shall not be liable to make any payment for Loss in connection with any

> Claim made against any of the Insureds for, based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged act, error or omission by any Insured with respect to the rendering of, or failure to render professional services for any party.

C.P. 617.

The record supports the court of appeals' conclusion.

A. The allegations in the NYU complaint all arose from the professional media services that Planet Earth was providing to NYU.

Gulf's duty to defend arises from the allegations contained in the NYU complaint. Planet Earth, at page 6, n. 1, of its brief provides information that is both irrelevant and improper. The information is irrelevant because the duty to defend is triggered by the allegations in the underlying complaint. The information is improper because it is referring to matters outside the record.

New York University, in its amended complaint, detailed its allegations against Planet Earth.

> 15. On ... October 30, 2001, ... an assistant to Lisa Bloom telephoned Catherine Collier ("Collier"), the Center's Director of Communications, in New York. ... The two did in fact speak on ... March 11, 2002, when Lisa Blume called Collier at Collier's office in New York.

16. During the March 11, 2002 call, Lisa Blume expounded on her superior knowledge and expertise in the area of public service advertising. ... These misrepresentations were designed to, and indeed did, induce NYU to part with $750,000 in charitable contributions in the expectation of receiving millions of dollars worth of coverage for a first class public service campaign. Specifically, Lisa Blume represented that Planet Earth had created successful media campaigns for many not-for-profit organizations ....

17. ... [I]n April 2002, Lisa Blume delivered to Collier a videotape and other materials that Lisa Blume said comprised examples of the original print and television spots that Planet Earth had created for prior clients. Lisa Blume falsely and intentionally represented that the work Planet Earth would undertake for NYU would be of similar quality to the marketing materials. Those materials included what appeared to be high-quality, originally scripted and filmed television commercials with professional actors, as well as originally produced print advertisements with professional models.

...

20. ... Lisa Blume and Planet Earth represented that Planet Earth had special expertise and success in creating public service campaigns for

charitable organizations and achieving effective placement of charitable messages in the media.

C.P. 687 to 690.

New York University alleged that Planet Earth was to provide the following services pursuant to the Agreement.

> 29. . . . Planet Earth ... agreed to donate all work related to the creation and production of television, radio, and print spots in furtherance of the Center's charitable mission.
>
> 30. In exchange, NYU agreed to pay Planet Earth $750,000 for Planet Earth's costs and services to place the spots through New York media outlets. NYU paid the full $750,000 on July 11, 2002.
>
> ...
>
> 39. Under the Agreement, Planet Earth retained any copyright and trademark rights to any original finished products and creative components, but specifically "excluding any rights to the name of NYU or the Child Study Center, any portion of the work created under this Agreement which identifies NYU or the Child Study Center and any materials which was not created by [Planet Earth] pursuant to this Agreement, including without limitation, the Children's Artwork."

C.P. 692; 694.

NYU, in its amended complaint, set forth the nature of the errors and omissions committed by Planet Earth.

> 41. Lisa Blume submitted to the Center a written presentation setting forth the progress of the Campaign. Planet Earth chose as the campaign title and tag line, "Caring About Our Kids," which is an imitation of NYU's "About Our Kids" trademark. Planet Earth did this intentionally, acknowledging that its chosen title "directly incorporates [the Center's] web site address, aboutourkids.org which will close each concept."
>
> ...
>
> 48. Under the Agreement, NYU is entitled to 10 VHS video copies of all television spots "within two weeks of completion of production." Planet Earth did not deliver the VHS tapes within that time period.
>
> ...
>
> 53. Upon information and belief, the "Remember" television spot aired, in accordance with Planet Earth's paid placement and the approved Media Plan, during the week of September 9, 2002. However, upon information and belief, the "Remember" spot never appeared on television as a result of Planet Earth's PSA placement services, if any, after the week of September 9, 2002.

54. Upon information and belief, no radio spots or print announcements for the "Remember" concept have ever appeared in any media outlet.

55. Upon information and belief, Planet Earth performed only paid placement services with regard to the "Remember" spot. Upon information and belief, Planet Earth did not provide any PSA placement services for the "Remember" concept as required under the Agreement and paid for by NYU.

. . .

57. Unbeknownst to NYU at the time, on September 16, 2002, Keith Blume, on behalf of Planet Earth, signed an "Intent to Use" trademark application with the United States Patent and Trademark Office to register as a trademark "CARING ABOUT OUR KIDS" in International Class 35. ...

...

59. Sometime in September 2002, when Lisa Blume and Keith Blume realized that NYU would not pay it any additional money and that NYU expected Planet Earth to comply with the terms of the existing Agreement, Planet Earth all but ceased performing its obligations under the Agreement. It did not account to NYU for the placement of paid media. It did not furnish affidavits from media outlets showing that the advertisements

were in fact broadcast. It did not make any attempts to place PSAs.

C.P. 694; 696 to 698.

B. All of the causes of actions that NYU alleged in its complaint arose from the professional media services that Planet Earth provided to NYU.

#1: Breach of Contract Claim Against Planet Earth[1]

The majority of the allegations that NYU raised in its complaint against Planet Earth were that Planet Earth breached the Agreement it had with NYU.[2]

C.P. 701 to 702.

#2: Fraud Claim Against Planet Earth and Lisa Blume

NYU alleged that Planet Earth and Lisa Blume made several knowingly false representations and submitted false materials to induce NYU to enter into the agreement for Planet Earth to provide the media campaign for NYU.

C.P. 702 to 705.

#3: Trademark Infringement and Unfair Competition Claim Against Planet Earth and Keith Blume

The last remaining claim asserted by NYU in its first amended complaint was that both Planet Earth and Keith Blume infringed upon

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[1] As acknowledged by Planet Earth, NYU filed an amended complaint. Accordingly, any duty to defend must be analyzed under the amended complaint.

[2] In addition to the professional services exclusion, the policy contained an exclusion for any claim against any of the insureds based upon a written, oral, or implied contract. CP 609-610.

NYU's trademark "About our Kids." From the complaint, the acts causing the alleged trademark infringement arose from the media services that Planet Earth was providing to NYU.

C.P. 705 to 706.

C. The trial court ruled that all of NYU's allegations contained in its complaint arose from the professional services that Planet Earth was providing and that the term "professional services" had a well-recognized, unambiguous meaning.

The trial court ruled in Gulf's favor in a summary judgment motion brought by Planet Earth. In explaining its ruling, the trial court stated:

> With regard to the "professional services" exclusion at issue in this motion, several courts, without exception and without any reference to extrinsic evidence, have interpreted 'professional services' to have the following plain and unambiguous meaning ... When this definition is applied to the claims made by NYU against the plaintiff/insureds, it is clear, even when NYU's complaint is liberally construed, that the claims arise out of plaintiffs' provision of professional services and therefore would never be covered. Accordingly, no duty to defend arises.

C.P. 948.

D. The court of appeals affirmed the trial court's ruling.

The court of appeals unequivocally affirmed the trial court's decision:

> The trial court correctly ruled that the professional services exclusion encompassed the claims against Planet Earth and that Gulf did not have a duty to defend. The professional services exclusion unambiguously encompassed public relations and advertising services; the claims brought against Planet Earth, including the fraud, trademark infringement, and unfair competition claims, all arise from Planet Earth's rendering or failure to render professional services. The insurance policy therefore did not require Gulf Underwriters to defend Planet Earth.

Court of appeals' opinion, p. 2.

III.
ARGUMENT

A. *Woo v. Fireman's Fund* supports the court of appeals' decision.

The primary argument being advanced by Planet Earth as to why this Court should accept discretionary review is that Division One did not follow its own ruling made earlier that same year in *Woo v. Fireman's Fund Ins.*, 128 Wn. App. 95, 114 P.3d 681 (2005). If that were true, then Planet Earth would have a basis under RAP 13.4(b) to seek discretionary review. *Woo*, however, does not conflict with the court of appeals' ruling in this case. Indeed, just the opposite is true – *Woo* supports the court of appeal's decision.

Planet Earth is correct in its recitation of the facts found in *Woo*. However, Planet Earth neglects to provide a thorough analysis of the case and its holding.

As noted by Planet Earth, *Woo* involved a dentist who took a photograph of his patient/employee while anesthetized with boar's tusks in her mouth and her eyes pried open. The issue before the court was whether any of the three insurance policies that the insured had through Fireman's Fund provided coverage. The insured dentist claimed that his professional errors and omissions policy provided coverage as the claim arose from his providing dental services. The court of appeals rejected this argument.

The court of appeals noted that no reasonable person could believe that a dentist would diagnose or treat a dental problem by placing boar tusks in a patient's mouth while she was anesthetized in order to take pictures with which to ridicule the patient. *Id.* at 103. The *Woo* court relied on the case of *Standard Fire Ins. Co. v. Blakeslee*, 54 Wn. App. 1, 9, 771 P.2d 1172 (1989) (citing *Washington Ins. Guar. Ass'n v. Hicks*, 49 Wn. App. 623, 627, 744 P.2d 625 (1987) (chiropractor's malpractice policy did not cover sexual incident with patient during treatment session). In *Blakeslee,* the court of appeals held that the insured had no duty to defend or indemnify the insured dentist and his corporation in a suit alleging that the dentist lifted his patient's shirt and fondled her breast while she was anesthetized so that he could fill cavities in her teeth.

The *Woo* court noted:

> Because the professional services that Blakeslee actually rendered could not "be said to be a proximate cause of the injuries alleged" by the patient, and because fondling his patient's breast could not "be said to have arisen out of the rendering or failure to render the professional services at issue," his acts were not covered under the professional liability portion of the policy.

Id. at 104.

Accordingly, the *Woo* court held that the intentional act of placing boar tusks in the patient's mouth was not, as a matter of law, providing dental services to the patient and as such, was not the type of act that fell within the coverage of the professional errors and omissions' policy.

In *Woo*, the insured also had a general liability policy with the insurer. The insured argued that the professional errors and omissions policy was at least ambiguous because the insurer, Fireman's Fund, denied coverage under the general liability policy because the patient's injuries arose from rendering a professional service. The court of appeals rejected this argument as well stating:

> But nothing in the general liability section of the policy renders the professional liability portion of the policy ambiguous. Neither the language of the professional liability portion of the policy nor the complaint is ambiguous here, and given the unambiguous allegations of the complaint, the trial court erred in holding that Fireman's Fund had a

> duty to defend under the professional liability portion of the policy.

Id. at 105.

Planet Earth fails to discuss this portion of the *Woo* holding and yet it is relevant to the analysis here. Planet Earth is taking the position that *Woo* should be read for the proposition that since the intentional wrongdoing in that case was not considered a professional service for purposes of coverage, then it must automatically be considered not a professional service for purposes of an exclusion. That very proposition was rejected in *Woo* as shown above. What Planet Earth fails to recognize, but what was expressly recognized in *Woo*, is that a different analysis is used in determining the effect of a "professional services" exclusion than is used to determine coverage for a professional errors and omissions policy.

What is important to determine, as the *Woo* court did, is the purpose of the policy at issue. A professional errors and omissions policy is intended to provide insurance to a professional for mistakes done in the course of rendering professional services. Sexually molesting a patient or performing acts to ridicule a patient are not part of rendering professional services and thus are not insured. In contrast, a general liability policy is not intended to provide insurance for liability arising from providing professional services no matter how tangential those acts may be, e.g.,

sexual molestation or ridicule. Accordingly, the *Woo* court held that the insured dentist did not have coverage under either policy.

Here, the policy was intended to provide coverage to liability to officers and directors of the nonprofit in their roles as officers and directors. It was not intended to provide insurance to Planet Earth for liability it might incur from providing professional services to others. The NYU allegations did not allege any facts that could be construed as Planet Earth being liable to it because of actions that officers and directors took in managing the nonprofit organization. Instead, all of the allegations involved alleged misdeeds by Planet Earth in its professional services capacity. As such, both the trial court and the court of appeals correctly ruled that there was no duty to defend under the Gulf policy. The court of appeals' decision does not conflict with *Woo* and instead follows the analysis set forth in *Woo*. Accordingly, there is no basis for discretionary review.

B. Planet Earth's argument that some jurisdictions recognize that the duty to promote workplace safety is an independent duty that does not arise from a professional duty does not provide a basis for discretionary review.

Planet Earth makes two assertions in section "B" of its brief, neither of which provides a basis for discretionary review.

Planet Earth notes that in some jurisdictions, in construction disputes, courts have recognized that general liability insurance policies

that have a professional services exclusion will not, as a matter of law, exclude coverage for claims alleging that the insured was negligent in discovering workplace hazards. Those cases, and the principles set forth in those cases, are not applicable here and do not provide a basis for discretionary review.

Those cases provide a specific exemption based upon public policy: there is always a general duty to warn of workplace hazards and such a duty does not arise from the professional services that a contractor may be providing. Because there is a general duty to look out for the safety of workers at a worksite, any professional services exclusion in an insurance policy does not apply. As one court explained:

> Although exclusions from general liability insurance policies for professional services or liability have evaded precise definition, courts have repeatedly found that claims based on workplace safety do not fall within the exclusion. [Citations omitted.] In addition to its duty to perform professional or supervisory services at a construction site, an engineering firm has a general duty of reasonable care toward the safety of other workers. An engineer may have a general duty to look out for the safety of other workers even when he is also contractually obligated to do so. [Citation omitted.]

Chemstress Consultant Co., v. Cincinnati Ins., 128 Ohio App. 3d 396, 401, 715 N.E.2d 208 (1998).

Here, such a principle has no bearing on the issue involved. NYU did not allege that Planet Earth was liable because of a workplace safety hazard. Instead, all of NYU's allegations arose from the professional services that Planet Earth was providing to NYU. But for the professional services that Planet Earth was providing, there is no basis for Planet Earth's alleged liability to NYU.

Next, Planet Earth raises the principle that there is no coverage for sexual assaults under a professional liability policy. That, however, is the same analysis used in *Woo* and, as shown above, supports the decision of the court of appeals and does not provide a basis for discretionary review.

C. Planet Earth's claim that the court of appeals' decision conflicts with Washington case law regarding an insurer's duty to defend is both false and does not provide a basis for discretionary review.

Planet Earth claims that the court of appeals' decision conflicts with Washington case law as to the scope of an insurer's duty to defend. Planet Earth fails to acknowledge that there must be allegations contained in the underlying complaint that are arguably covered by the policy. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998). And while the duty to defend is broad, an insurer has no duty to defend claims based on factual allegations that are clearly not covered by the policy. *Id.* Where an insurance policy exclusion clearly and unambiguously applies to bar coverage, the court's inquiry ends. *Scottsdale Ins. v. Int'l Protective*

Agency, 105 Wn. App. 244, 249, 19 P.3d 1058 (2001). The language in an insurance policy should not be strained to create an ambiguity where none exists. *Pacific Indemnity Co. v. Linn*, 766 F.2d 754, 761 (3rd Cir. 1985). Indeed, "a court should read policy provisions to avoid ambiguities, if possible, and not torture the language to create them." *St. Paul Fire & Marine Ins. Co. v. United States Fire Ins. Co.*, 655 F.2d 521, 524 (3d Cir. 1981). Instead, policy language should be interpreted according to its ordinary meaning. *Dairyland Ins. v. Ward*, 83 Wn.2d 353, 517 P.2d 966 (1974). A policy provision is ambiguous if reasonably intelligent people would honestly differ as to its meaning when considering it in the context of the entire policy. *Northbrook Ins. v. Kuljian Corp.*, 690 F.2d 368, 372 (3d Cir. 1982). In construing key clauses and words, the court must attempt to ascertain what was probably contemplated by the parties when the contract was written. *Harris v. Fireman's Fund Indemnity Co.*, 42 Wn.2d 655, 257 P.2d 221 (1953).

These same principles were recognized by the *Woo* case upon which Planet Earth relies and agrees. The court of appeals' decision did not deviate from these principles.

An insurer's duty to defend has limitations. Those limitations are found in the contract. Washington case law has always recognized that there are limits to an insurer's duty to defend. The court of appeals

correctly applied those limitations to this case. Accordingly, there is no basis for discretionary review.

D. The definition of "professional services" found in RCW 18.100.030(1) is not applicable in the insurance context and does not provide a basis for discretionary review.

Planet Earth is claiming that this Court should accept review because of a definition of "professional services" found in RCW 18.100.030(1). This argument fails for a number of reasons.

First, Planet Earth never raised this issue before the trial court. Accordingly, the argument should not be considered in any attempted appeal. *See Babcock v. State*, 116 Wn.2d 596, 606, 809 P.2d 143 (1991).

Second, Planet Earth ignores the explicit directive given by the legislature regarding the use of this definition: "As used in this chapter the following words shall have the meanings indicated: ... 'professional service.'" (Emphasis added.) The definition given by the legislature for the term "professional service" was for the use of RCW 18.100 only and not for any other purpose.

Third, Planet Earth ignores the purpose of that statute: it was enacted to allow a professional services corporation to render services to clients and patients even though the corporation itself did not hold a license necessary to provide those services. In other words, the statute allows physicians to create a professional services corporation to treat patients even though the corporation itself does not hold the necessary

license to practice medicine. It included within this group all professions that are required to be licensed by the state. As set forth in RCW 18.100.010: "It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization." The legislature did not intend to define the term "professional services" for insurance policy purposes.

Fourth, the court of appeals' decision regarding the inapplicability of the definition found in RCW 18.100 for an analysis of insurance coverage does not conflict with any decision of this Court, of another court of appeals, or raise a matter of substantial public interest.

For those four reasons, the argument being advanced by Planet Earth should be rejected.

E. Planet Earth's claim that the policy at issue is illusory is false and does not provide a basis for discretionary review.

Planet Earth is claiming that the insurance policy at issue is illusory. Not only is this false, but also does not provide a basis under RAP 13.4 for discretionary review.

The policy here provides coverage for what was intended: officers and directors of a nonprofit organization acting in their roles as officers and directors. Accordingly, if an officer had been sued for allegedly

improperly firing an employee, then that would have triggered coverage. If a director had been sued for allegedly negligent investment of donated funds, then that would have triggered coverage. These are but a couple of examples of coverage that was both intended, and afforded, under the policy at issue.

The court of appeals' decision to reject this argument does not conflict with any of this Court's opinions or those of any other court of appeals. In addition, Planet Earth has not explained how this issue is one that is of substantial public interest. It is not.

CONCLUSION

Both the trial court and the court of appeals applied the correct legal principles in their analysis of this dispute and both courts correctly ruled that all of the allegations that NYU raised in its complaint arose, either directly or indirectly, from Planet Earth's providing professional services. Planet Earth has attempted to rely primarily on the *Woo* case as a basis for discretionary review arguing that *Woo* conflicts with the court of appeals' ruling in this case. As shown, this is simply incorrect.

Gulf requests this Court to deny Planet Earth's request for discretionary review.

Dated this 7 day of February, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 2nd day of February, 2006, she placed with ABC Legal Messengers, Inc. a true and correct copy of Response to Petition for Discretionary Review for hand delivery to counsel of record:

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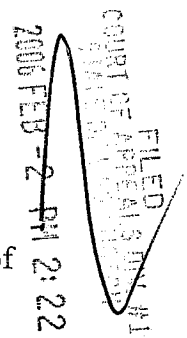

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Gina A. Mitchell

Gina A. Mitchell